89-31

No._____

FILED
JUL 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

ROBERT S. STITT
(Counsel of Record)
PEARLMAN, VOGEL & VIOLET
Blackstone Boulevard Terrace
P.O. Drawer 9007
Providence, RI 02940
(401) 726-6200
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants' sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

TABLE OF CONTENTS

	Page
Table of Authorities	iii-viii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions and Rule Involved	3
Statement Of The Case	3
A. R.I. Superior Court Proceedings	3
B. R.I. Supreme Court Proceedings	8
Reasons for Granting the Writ and Summary Reversal for Further Proceedings	11
A. Denying Petitioners' Standing was Patently Untenable	13
B. Rule 56 Summary Judgment was Patently Untenable	17
C. Reliance on an Unpublished, Non-record Attorney General's Opinion was Patently Untenable	22
The Questions Presented Are Properly Before the Court	23
Conclusion	28
Petitioner's Appendix	*P.A. 1-46*
Order/Decision of R.I. Supreme Court, February 28, 1989	1-3
Order/Decision denying reargument, March 13, 1989	3

Page

Decision/Judgment of R.I. Superior Court, July 1, 1988 4-5

R.I.G.L., Sec. 18-9-5 6

R.I. (Federal) Rules of Civil Procedure, Rule 56, ... 7-10

Family Service, Inc. v William E. Powers, Attorney General, (Providence Co., Eq. No. 21550)

(1) *Cy pres* order (Final Decree) February 15, 1951 11-12

Deed, Family Service, Inc. to Children's Friend & Service, recorded April 9, 1951 13-14

Warwick Land Trust v Children's Friend & Service, et al (Kent C.A. No. 87-811)

(a) Affidavit of plaintiff Paul Huling, sworn to May 19, 1988, in opposition to summary judgment motion 15-25

(1) Annexed letter from Audubon Society of Rhode Island Executive Director, Alfred L. Hawkes to Friends of Warwick Pond and Hoxsie, February 20, 1987 26-29

(b) Excerpts memorandum in support of defendant's (CF&S) motion to dismiss, August 17, 1987 30-31

(c) Excerpts plaintiffs' rescheduled motion to compel production from CF&S, April 29, 1988 32-36

(1) Excerpts expurgated copies of CF&S board minutes 37-41

(d) Excerpts from CF&S April 26, 1988 memorandum in support of motion for summary judgment 42-44

Letter from petitioners' counsel to the R.I. Supreme Court, March 16, 1989 45-46

TABLE OF AUTHORITIES

Cases: *Page*

Adickes v S.H. Kress & Co., 398 U.S. 144 (1970) ... 19, 22

Auto-Lite Products, Inc. v Gilbane Building Company, 347 A.2d 623 (R.I. 1975) 9, 18

Anderson v Liberty Lobby, Inc., ____U.S.____, 106 S. Ct. 2505 (1986) 19

Baker v Carr, 369 U.S. 186 (1962) 14

Belcher v Conway, 179 Conn. 198, 425 A.2d 1254 (1979) 25

Berberian v Solomon, 122 R.I. 259, 405 A.2d 1178 (1979) 9, 13, 14

Blackstone Valley Chamber of Commerce v Public Utilities Commission, 452 A.2d 931 (R.I. 1982)..... 13, 14

Bolling v Sharpe, 347 U.S. 497 (1954) 13, 27

Bradley v Fisher, 80 U.S. 335 (1872)..... 18

Brinkerhoff-Faris Co. v Hill, 281 U.S. 673 (1930) ... 27

Brown v Credit Center, Inc., 444 So.2d 258 (Miss. 1983) 26

Celotex v Catrett, 477 U.S. 317 (1986)..... 11

Cerqueira v Cerqueira, 828 F.2d 863 (1st Cir. 1987) . 20

Citizens to Preserve Overton Park, Inc. v Volpe, 401 U.S. 401 (1971)..... 12, 14

City of Providence v Payne, 47 R.I. 444, 133 A. 621 (1926) 8, 17

TABLE OF AUTHORITIES – Continued

	Page
City of Providence v Powers, 83 R.I. 512, 120 A.2d 811 (1956)	24, 25
City of Reno v Goldwater, 558 P.2d 532 (Nev. 1976)	16
Donnelly v Israel, 113 R.I. 29, 317 A.2d 443 (1974)	10, 22
Eddings v Oklahoma, 455 U.S. 104 (1982)	27, 28
Faunce v Peoples Savings Bank, 46 R.I. 75, 124 A. 731 (1924)	25
Goldberg v Kelly, 397 U.S. 254 (1970)	23, 28
Greene v McElroy, 360 U.S. 474 (1959)	23
Hartt v Hartt, 397 A.2d 518 (R.I. 1979)	9, 18
Industrial National Bank v Peloso, 397 A.2d 1312 (R.I. 1979)	18
Israel v National Board of Y.M.C.A., 369 A.2d 646 (R.I. 1977)	14, 15, 27
Kirkpatrick v Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955)	19, 28
Leo v Armington, 74 R.I. 124, 59 A.2d 371 (1948)	14, 15
Logan v Zimmerman Brush Co., 455 U.S. 422 (1982)	16
Matunuck Beach Hotel, Inc. v Sheldon, 399 A.2d 489 (R.I. 1979)	9, 13
Mullane v Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	16

TABLE OF AUTHORITIES – Continued

	Page
Nichola v John Hancock Mutual Life Insurance Co., 471 A.2d 945 (R.I. 1984)	2, 9, 18, 19, 22
Newport Hospital v Harvey, 47 R.I. 382, 133 A. 648 (1926)	14, 15
Parsons v Walker, 28 Ill. App. 3rd 517, 318 N.E. 2d 920 (1975)	16
Pell v Mercer, 14 R.I. 412 (1884)	19
Petition of Downer Home, 67 Wis. 2d 55, 226 N.W. 2d 444 (1975)	18, 24
Powers v Home for Aged Women, 55 R.I. 187, 179 A. 610 (1935)	14, 15
PruneYard Shopping Center v Robbins, 447 U.S. 74 (1980)	27
Quinn v Syracuse Model Neighborhood Corp., 613 F.2d 438 (2nd Cir. 1980)	21
R.I. Hospital Trust v Benedict, 41 R.I. 143, 103 A 815 (1918)	19
R.I. Hospital Trust v Williams, 50 R.I. 385, 148 A 189 (1929)	19
Rolnick v El Al Airlines, Ltd., 551 F. Supp. 261 (D.C.N.Y. 1982)	21, 22
Sames v Gable, 732 F.2d 49 (3rd Cir. 1984)	21
Sartor v Arkansas Natural Gas Co., 321 U.S. 620 (1944)	28
Sierra Club v Morton, 405 U.S. 727 (1972)	13, 14

TABLE OF AUTHORITIES — Continued

	Page
South Kingstown v Wakefield Trust Co., 48 R.I. 27, 134 A. 815 (1926)	19, 25
State v Sousa, 456 A.2d 775 (R.I. 1983)	9
Stearns v The Newport Hospital, 27 R.I. 309, 62 A. 132 (1905)	15
Steinberg v State of R.I., 427 A.2d 338 (R.I. 1981)	9, 22
Stump v Sparkman, 435 U.S. 349 (1978)	18
Taylor v Kentucky, 436 U.S. 478 (1978)	27
United States v One Heckler-Koch Rifle, 629 F.2d 1250 (7th Cir. 1980)	20
Vachon v New Hampshire, 414 U.S. 478 (1974)	27
Wood v Georgia, 450 U.S. 261 (1981)	27, 28
Constitutional Provisions, Statutes and Rules:	
Constitution of the United States Amendment XIV, Sec. 1	3, 11, 13, 16
28 U.S.C.	
Sec. 1257	2
Sec. 2106	2, 28
R.I.G.L.	
Sec. 18-4-1	5, 17, 25
Sec. 18-9-5	3, 8, 10, 13, 14, 15, 17

TABLE OF AUTHORITIES — Continued

	Page
Sec. 19-24-27	6
Rules of the Supreme Court of the United States	
Rule 17	2, 20
Federal Rules of Civil Procedure	
Rule 12(b)(6)	6
Rule 34	25
Rule 56	2, 3, 6, 9, 17, 18
R.I. Rules of Civil Procedure	
Rule 12 (b)(6)	6, 13
Rule 34	25
Rule 56	2, 3, 6, 9, 17, 18
Other:	
15 *Am Jur 2d, Charities*	
Sec. 5	19
Sec. 6	19
Sec. 159	25
The American Heritage Dictionary Second College Edition (1982)	5

TABLE OF AUTHORITIES — Continued

Page

Annot, 62 A.L.R. 881 (1929) "Who may maintain suit or proceedings to enforce or adminster benevolent or charitable trusts" 15, 16

Decade of Decision, Tom Wicker, New York Times, February 28, 1989 12

Housing America in the 1990s, 30th Annual Symposium Program, Columbia Law School, April 29, 1989 11

6 *Moore's Federal Practice*, Sec. 56.02(1) 11

Reddish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 1985, 19 Ga. L. Rev. 861 27

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (1983)

Sec. 2723 20

16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* (1977)

Sec. 4021 26

Sec. 4027 26

Sec. 4031 26

16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1888 Supplement)

Sec. 4031 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.____

FRIENDS OF WARWICK POND AND HOXSIE
also WARWICK LAND TRUST, PAUL HULING,
JEANNE M. FOSTER, EILEEN NAUGHTON and
KATHLEEN PREISS

Petitioners

vs

CHILDREN'S FRIEND AND SERVICE, INC.,
FRANK P. SHERRY, R & F ASSOCIATES,
RHODE ISLAND CENTRAL CREDIT UNION and
JOHN DOES, ONE through FIVE

Respondents

and JAMES O'NEIL, in his capacity as
Rhode Island Attorney General

Additional Party — Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of The State of Rhode Island

The Warwick Land Trust* and the individual petitioners (plaintiffs below) hereby pray for the issuance of a writ of certiorari to (a) review, (b) summarily reverse and (c) remand for further proceedings the decision and order of the Supreme Court of the State of Rhode Island in *Friends of Warwick Pond, et al vs Children's Friends and Service, et al*, No. 88-426 — appeal, entered February 23, 1989.

OPINIONS BELOW

The decision and order of the Rhode Island Supreme Court (unreported) is reproduced in the petitioners' appendix, 1-3.**

*Incorporated as "Friends of Warwick Pond and Hoxsie, also Warwick land Trust"

**References, unless, otherwise indicated, are to petitioners' appendix, *infra.*

The decision and judgment of the Rhode Island Superior Court (also unreported) is reproduced at pages 4-5 of the petitioners' appendix.

JURISDICTION

The decision of the Rhode Island Supreme Court was entered on February 23, 1989. A timely petition for reargument (rehearing) was denied on March 13, 1989. (P.A. 3, 45-46). The jurisdiction of this Court rests on 28 U.S.C., Sections 1257 and 2106 and Supreme Court Rule 17.

QUESTIONS PRESENTED

1. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to carve out a new rule denying petitioners standing and apply it retroactively against diligent representative plaintiffs disregarding (a) their demonstrated compliance with the R.I. adopted Federal standing/access barrier test and (b) four prior R.I. Supreme Court decisions and a R.I. statute that the Attorney General, whom the plaintiffs had named at the outset, is but a necessary party to charitable trust litigation.

2. Whether it was plainly untenable, a denial of due process and a violation of Rule 56 of the Rhode Island (Federal) Rules of Civil Procedure* to approve the granting of summary judgment on a record which shows (a) that the trial/lower court below's sole ultimate finding was based on a mistaken conception of its decisional authority** and (b) that important discovery - addressed to the movants themselves - was still outstanding and (c) that, at most, the defendants had raised merely a mixed question of law and fact.

3. Whether it was plainly untenable and a denial of due process for the R.I. Supreme Court to give weight to a purported R.I. Attorney General opinion (or finding) of "no fault" in the defendants'

---

*The two rules (R.I. and Federal Rules 56) are identical in all respects. *Nichola v John Hancock Mutual Life Insurance Co.*, 471 A.2d 945, 947, (R.I. 1984)

**Also based on Rhode Island's adoption of Federal *res judicata*/fundamental jurisdictional principles, page 9 n *infra*.

sale/purchase of the charitable property at issue ("Lakeside") for commercial real estate development which "opinion" (a) was not part of the record, (b) the plaintiffs had never seen, much less been given an opportunity to answer, and (c) whose existence* was not asserted until the February 13, 1989 appellate oral argument.

4. Whether the United States Supreme Court will summarily reverse and remand for further proceedings a case which turns on state adopted Federal law (standing, *res judicata* and Rule 56 summary judgment) all patently violated by the courts below, thus depriving representative plaintiffs of their sole means of preventing monetary, recreational and environmental damage to themselves, their homes and their community.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

Amendment XIV, Section 1, of the Constitution of the United States which provides:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 56 of the Rhode Island (and Federal) Rules of Civil Procedure, reproduced in petitioners' appendix, *infra.* (P.A. 7-10)

Rhode Island General Laws, Section 18-9-5, reproduced in petitioners' appendix, (P.A. 6)

STATEMENT OF THE CASE

A. R.I. Superior Court Proceedings

This class action suit is focused on some twenty acres of

*The Attorney General had an opportunity to solve this puzzle in his March 13, 1989 response to the plaintiffs' February 28th reargument petition but chose not do so.

charitable, recreational primarily open land adjoining Warwick Pond ("Lakeside"). The property had been acquired in 1912-16 by the initial charitable holder (Providence Society for Organizing Charity*) with funds specially solicited from community members for the purpose of aiding its pre-existing recreational and remedial programs - handicapped from lack of a permanent location under its control - and was so used for the following 70 years. See, pages 23-24 *infra*, P.A. 11-12, 20-29 and cited sources.

The petitioners are taxpaying homeowners who live in close proximity to Lakeside and enjoy its beauty. Through this suit the petitioners seek to prevent serious monetary, recreational and environmental damage to their homes and their community which, as alleged in their verified pleadings and confirmed by distinguished expert opinion, will surely happen if this land is misappropriated for private development. (P.A. 15-16, 23-29)

Respondent Children's Friend and Service ("CF&S") acquired *cy pres* title to the premises in 1951 without monetary payment pursuant to R.I. Superior Court *cy pres* proceedings brought by the initial charitable donee, *Family Service Inc v William E. Powers, Attorney General*, No. 21550. (P.A. 11-14) The subsequent April 1951 recorded deed transferring the Lakeside property, without monetary payment, from the Society to CF&S, both identified therein as charitable corporations, specifically provided that the Society's transfer was:

> "...pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951 in that case entitled *Family Service, Inc. v William E. Powers*, Attorney General of the State of Rhode Island, Eq. No. 21550...."

and that the property was:

*Subsequently renamed Family Service, Inc.

"...to be *held** by said Children's Friend and Service for its general uses and purposes."**

(P.A. 13-14, Emphasis added)

The Superior Court's aforementioned February 16, 1951 *cy pres* decree (Walsh, P.J.) provided:

"This cause came on to be heard on the bill, answer and *proof* and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit *continued* carrying out of the *charitable purposes* for which said real estate has heretofore been *held and used* by Family Service, Inc., and is also *consistent* with the *intentions* of the persons who *caused* the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and deliver a deed or deeds conveying said real estate to Children's Friend and Service, *to be held* for *its general uses and purposes.***

(P.A. 11-12, Emphasis added)

The aforementioned *cy pres* order was, in itself, controlled by the R.I. *cy pres* statute (R.I.G.L., Sec. 18-4-1) which declares:

"In *all* cases of charitable gifts of real or personal estate, whether by deed or will, where the *purposes of the donor* cannot be literally carried into effect, a complaint may be filed for a *cy pres* application of the *trust property;* and *thereupon all* such proceedings, orders and decrees *shall be had and taken* in said suit, to carry out *the intents of the donor* as *near* as may be, *that such charity may not fail,* and to this end application as aforesaid may be made in the same complaint for appointment of new trustee or trustees under or pursuant to the provisions of sections 18-2-1 to 18-2-8, inclusive, or under the general equity powers of the court."

(Emphasis added)

Petitioners challenge CF&S' June 1987 efforts to by-pass the Superior Court's pre-existing, continuing, mandatory jurisdiction and, on its own initiative without Superior Court authority, to *sell* this charitable land for private development and thus permanently change its use from community charity and enjoyment to private develop-

---

*"To hold is defined "*a*, to have and keep in one's grasp. *b*, to keep up, support...*c*, to maintain in a certain position or relationship...*d*, to keep in reserve or custody..." *The American Heritage Dictionary, Second College Edition* (1982)

**Exclusively charitable (P.A. 11-14)

ment and profit (P.A. 16, 20-24). Their initial verified class action complaint was the subject of a CF&S August, 1987 12(b)(6)* motion to dismiss. CF&S' primary argument was that the petitioners lacked standing and that only the R.I. Attorney General could sue for breach of charitable trust. Memoranda were submitted by both sides. CF&S' memorandum conceded the *cy pres* source and admitted the *trust* nature of its title. (*Id.*, P.A. 19-20, 30-31)

Although named in the complaint and duly served by both sides, the Attorney General submitted no papers and did not appear at the August 24, 1987 oral argument before Judge Bulman. (The Court was informed, by CF&S counsel, that while the Attorney General did not join in CF&S' motion he would not "object" if the Court, acting without his urging, should choose to grant CF&S' application.) The Court denied CF&S' motion and held that the petitioners' were entitled to proceed with full pre-trial discovery ("get their licks in"). (P.A. 19-20, 23) No appeal was attempted and, most significantly, no effort was made by any party to invoke certification. The Attorney General could have readily taken this step even without court permission if, as R.I.G.L., Section 19-24-27 provides, he was prepared to certify that in his opinion the question was:

> "...of such doubt and importance and so affects the merits of the controversy that it ought to be determined by the supreme court before further proceedings..."

A subsequent CF&S motion, invoking rule 56,** but now denying trust title, was served April 26, 1988. (P.A. 15-16, 42-44) Petitioners' discovery, although diligently pursued was, (and still is) far from complete. Petitioners' outstanding discovery included (1) their pending motion to compel production of *complete,* unexpurgated - (rather than *50-75%* in some instances 90% deleted) copies of

---

*Identical to F.R.C.P. 12(b)(6)

**Identical to F.R.C.P. 56

CF&S' contemporaneous 1950-51 directors' minutes; (2) their pending notice to depose CF&S by its summary judgment affiant, president Aitken and (3) other outstanding deposition notices and document requests addressed to the movants (P.A. 18-20, 24, 32-44 and sources cited therein).

In opposition petitioners submitted a 28 page memorandum of law plus an affidavit of Warwick Land Trust president Paul Huling, both incorporating petitioners' supplemental answers to interrogatories (60 pages, including appended historical documents obtained from Lakeside's initial charitable holder), their amended verified complaint, filed March 31, 1988 (30 pages including exhibits) and their outstanding discovery demands and motions (P.A. 15-25 and sources cited therein). Matters briefed by the parties (except the Attorney General) included petitioners' standing to bring the action (previously briefed before Judge Bulman); the initial charitable holder's documented forty years recognition and confirmation of the fiduciary duties arising from its acquisition of Lakeside with specially solicited community funds; CF&S' claim that it held Lakeside in fee simple absolute without restriction (notwithstanding the 1951 *cy pres* source and its 1987 aforementioned August, 1987 memorandum admission of its trust title); and, as indicated above, petitioners' outstanding discovery. (*Id*, P.A. 11-12, 15-25, 32-44)

The Superior Court (Bourcier, J.) granted CF&S summary judgment pursuant to June 13 bench ruling and July 1, 1988 decree. No written opinion was entered. The Court's sole ultimate July 1, 1988 decree finding was that the land at issue ("Lakeside") was "not subject to the application of the *cy pres* doctrine of law which

pertains to trust property..."* A timely appeal to the R.I. Supreme Court was taken on July 6, 1988. (P.A. 1-5).

B. R.I. Supreme Court Proceedings

Following submission of pre-briefing statements, a single justice conference was conducted on November 29, 1988. An order was then entered, following defendants' application therefor, directing all parties to show cause why the issues raised by the appeal should not be summarily decided. The issues as listed therein were:

> "(a) whether a question of fact exists which should have precluded the entry of summary judgment,
>
> (b) whether the trial justice erred as a matter of law in granting summary judgment even if no question of fact was disclosed on the record,
>
> (c) whether the plaintiffs had standing to challenge the conveyances**.
>
> (d) whether issues presented by the parties have been preserved for appellate review." (*Id.*)

The petitioners were given leave to file a memorandum not

---

*The "trust property" phrase in the R.I. *cy pres* statute refers not to an express trust as defendants argued, but rather to "property held upon charitable trust." *City of Providence v Payne*, 47 R.I. 444, 455, 133 A. 621 (1926). Presiding justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by the initial recipient, the Providence Society for Organizing Charity (now known as Family Service, Inc.) and therefore within Superior Court *cy pres* authority. Judge Bourcier clearly thought that Judge Walsh had been mistaken in making that determination and because it pertained to jurisdiction, that he was free to rule otherwise – 37 years later and on summary judgment. June 13, July 1, 1988 transcript 21, 27-29, 39 ("That is jurisdictional when you come down to it. Jurisdiction can be raised any time, notwithstanding the erroneous assumption of jurisdiction in the previous situation (*sic*). That concludes the matter. We'll stand in recess." *Id* 39. As demonstrated at pages 17-24, *infra* Judge Bourcier was wrong on two counts of R.I. adopted Federal law - (1) *res judicata* and (2) Rule 56 summary judgment principles.

**While otherwise adopting the defendant-appellees' contentions, the Attorney General expressed no exception to his having been "incuded as a defendant (additional party) in Superior Court as well as a co-appellee pursuant to Rhode Island General Law 18-9-5. This statute (reproduced at P.A. 6 *infra*) requires that the Attorney General shall be notified of all judicial proceedings affecting, or in any manner dealing with a charitable trust... and shall be deemed an *interested* (sic) party thereto." *Id*, emphasis added. See page 6 *supra*.

exceeding 15 pages by January 15, 1989. Defendants' briefs were due February 7, 1989. Oral argument was subsequently scheduled for February 13, 1989. Matters briefed by the parties (except the Attorney General who adopted defendant R&F's memorandum), included (a) the initial charitable holder's documented forty years' recognition and confirmation of its charitable trust duties arising from its acquisition of Lakeside with specially solicited community funds; (b) the binding *res judicata* effect of the R.I. Superior Court's 1951 decree that Lakeside was charitable trust property; (c) the Superior Court's exclusive, continuing, mandatory jurisdiction over Lakeside's title and use; (d) CF&S' repeated admissions of trust title in its August, 1987 Superior Court memorandum; (e) the impropriety of granting Rule 56 summary judgment where the movants (1) were resisting discovery and (2) at most had only conjured up a mixed question of law and fact concerning the doctrine of charitable trusts; and, for the third time, (f) the petitioners' right to maintain their action.* *Id.*

Oral argument (10 minutes for petitioners and 30 for respondents) was conducted, as scheduled, on February 13. During the oral argument — when its existence surfaced for the first time — and again in its February 23 order/decision, the Court was visibly impressed by an alleged Attorney General opinion or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development. The record, as indicated above at page 3 *supra*, contains *no* such opinion or finding - written or oral. Indeed, the

*While primarily briefed in terms of state law each of these issues involved adopted Federal rules and case law. E.g. *Air-Lite Products, Inc. v Gilbane Building Company*, 347 A.2d 623, 629-31 (R.I. 1975) - *res judicata*; *Hartt v Hartt* 397 A.2d 1178, 1180 (R.I. 1979) and *State v Souza* 456 A.2d 775, 779 (R.I. 1983) *res judicata* and subject matter/fundamental jurisdiction; *Matunuck Beach Hotel, Inc. v. Sheldon*, 399 A.2d 489, 493 (R.I. 1979) and *Berberian v. Solomon*, 405 A.2d 1178, 1180 (R.I. 1979) - standing; *Nichola v John Hancock Mutual Life Insurance Co. supra* and *Steinberg v State* 427 A.2d 338, 339-340 (R.I. 1981) - Federal Rule 56 and summary judgment decisions.

record shows that the Attorney General was given *no* advance notice of the proposed sale* (P.A. 1-3, 18-19).

The Court's two page decision, signed by the clerk and summarily denying the petitioners' appeal, was entered February 23, 1989. Under the rule, petitioners had five days, i.e. until February 28, 1989, to prepare and file a petition for reargument.** The petitioners did so. (P.A. 1-3, 45-46).

In their February 28 application for reargument, the petitioners asserted that crucial matters presented in the various briefs and relied upon at the February 13 oral argument had been overlooked or misapprehended; that the Court's order/decision contained or represented clear error; and that such error was appropriately demonstrated when viewed in three parts:

> (1) The Court's statement that only the Attorney General has standing to bring suit regarding breach of charitable trust;
>
> (2) the undertaking of the Superior Court, if not the R.I. Supreme Court, to decide on summary judgment mixed questions of law and fact relating to
>
> > (a) the trust nature of the Lakeside property; and
> >
> > (b) whether the 1951 conveyance authorized by Judge Walsh's *cy pres* order constituted an unrestricted fee simple transfer; and
>
> (3) The Court's indicated reliance on an unpublished, non-record Attorney General opinion or finding of "no fault" in CF&S' unilateral sale of the Lakeside property for commercial real estate development.
>
> (*Id*, p.1)

The petition for reargument, following written responses by defendant R&F Associates and the Attorney General (containing no mention of his foregoing "opinion"), was denied without comment by

---

*CF&S' failure to give the Attorney General specific statutory Superior Court notice is, in itself, grounds for nullifying the June, 1987 conveyance. *Donnelly v Israel*, 113 R.I. 29, 317 A.2d 443 (1974), construing R.I.G.L., Sec. 18-9-5, *supra*.

**Petitioners' copy of the Court's February 23 decision, enclosed in an envelope metered February 24 and postmarked February 25, was not received from the Court until Monday, February 27, 1989. (*Id*, noted in counsel's February 28 letter, enclosing petition for reargument.)

deputy clerk order entered March 13, 1989. While the R.I. Supreme Court Rules contain, (as a clerk reminded counsel), no provisions for further application, petitioners, by March 16 filed letter, notified the R.I. Supreme Court and all parties of their intention to seek relief from this Court because, *inter alia*, of the denial of their Fourteenth Amendment due process and equal protection rights. (P.A. 45-46)

REASONS FOR GRANTING THE WRIT AND SUMMARY REVERSAL FOR FURTHER PROCEEDINGS

Petitions brought this action to protect their homes, their neighborhood and their environment - the most fundamental property and liberty rights which anyone can have.* They were simply "railroaded".**

Lakeside is a mid-Rhode Island environmental oasis. The property's flora, fauna, fish, brook tributary/estuary to Narragansett Bay and marshlands constitute a biologically unique ecosystem. There is nothing like it for miles — an environmental enclave bounded as it is by an airport, shopping center and existing residential development. Lakeside's environmental significance, its recreational and educational potential and its value to the entire Warwick, R.I. community, is best demonstrated by the annexed February 20, 1987 letter from R.I. Audubon Society executive director Alfred L. Hawkes to the petitioners, written when they were first beginning their dedicated battle. (P.A. 26-29)

---

*"Congress in 1949 called for the realization as soon as feasible of the goal for a decent home and a suitable environment for every American Family." *Housing America in the 1990s*, 30th annual Symposium Program, Columbia Law School, April 29, 1989. By looking out its windows the Court can judge how far our country has come in "achieving this goal"...*Id.*

**_Celotex v Catrett_, 477 U.S. 317, 326 (1986). See also 6 *Moore's Federal Practice*, Sec. 56.02(1) and decisions therein discussed.

The Court should not allow petitioners' struggle to be lost so early and so cheaply. As Smithsonian Institution biologist Thomas Lovejoy warned in his chilling April, 1988 prediction to the American Institute of Biological Sciences:

> "I am utterly convinced that most of the great environmental struggles will be won or lost in the 1990's, and that by the next century it will be too late."
>
> *Decade of Decision,* Tom Wicker,
> New York Times, February 28, 1989

These struggles will be fought on all levels — local, national and international — and by many people including government leaders, institutional professionals and, in this case, local community residents. Two decades ago, in *Citizens to Preserve Overton Park, Inc. v Volpe,* 401 U.S. 402, 404 (1971), the Court noted the growing concern about the quality of our natural environment that has prompted Congress in recent years to enact legislation to curb the accelerating destruction of our country's beauty. The need is now crucial. Environmental battles must be fought and (hopefully) won. This Court, at the very least, should seize every opportunity to ensure that these struggles will be fought under rules of fair play.

The petitioners, after having survived a threshold motion challenging their right to protect Lakeside, and after having demonstrated, in spades, the "concrete adversity" that sharpens issues, the very objective which Rhode Island's adopted Federal "injury in fact" test is designed to ensure (in pursuit of pre-trial discovery to which the threshold judge declared they were entitled), were suddenly terminated by a patently untenable summary judgment in violation of Rhode Island's adopted Federal Rule 56 and case law. (P.A. 16-25, 4-5) The R.I. Supreme Court, through a "summary procedure" not equal to the issues, then sealed the result in a two page, clerk signed decision (1) ignoring and plowing under

four prior R.I. Supreme Court decisions and a statute to boot* — that the state Attorney General was *not* the sole person who could sue for breach of charitable trust; and (2) giving weight to an unpublished, non-record Attorney General "opinion" which the petitioners have never seen and whose very existence must be doubted. All of this, as the petitioners stressed in their February 28, 1989 petition for reargument** was "manifestly unfair..."***. [The R.I. Supreme Court scarcely needed reminding of the resultant denial of Fourteenth Amendment due process and equal protection.****]

DENYING PETITIONER'S STANDING WAS PATENTLY UNTENABLE

The R.I. Supreme Court's adverse, retroactive ruling on the petitioners' standing was just wrong. Petitioners at the very outset, satisfied the R.I. adopted Federal "injury in fact" test*****, as demonstrated by the Superior Court's unappealed August, 1987 decision denying defendants' Rule 12(b)(6) motion (P.A. 19-20) *Matunuck Beach Hotel Inc., v. Sheldon*, and *Berberian v. Solomon, supra* citing *inter alia, Sierra Club v. Morton* 405 U.S., 727 (1972). Having negotiated this "access barrier" (standing) the petitioners then proceeded to devote time, money and effort — the "concrete

*R.I.G.L., Sec. 18-9-5 *supra*, page 3 and P.A. 6.

**Hastily prepared in the precious little time available, page 10 n. *supra*.

***As the Court noted 35 years ago, the concepts of equal protection of the laws and due process "both stem from the American ideal of fairness..." *Bolling v Sharpe*, 347 U.S. 497 (1954).

****Petitioners March 16, 1989 letter (P.A. 45-46); see page 11 *supra*.

*****Petitioners also satisfied the alternative test, which the R.I. courts had previously "carved out", permitting representative plaintiffs to proceed even without allegations of personal injury in cases involving substantial public issues which might be rendered moot if they were not allowed to proceed. *Blackstone Valley Chamber of Commerce v Public Utilities Commission* 452 A.2d 931, 933 (R.I. 1982); *Berberian v. Solomon supra*. Indeed, the failure of the Attorney General (or others) to commence or join this suit, to protect such unique recreational and environmental property, is positive proof of the alternate R.I. standard (P.A. 18-19).

adversity" that sharpens issues — the very objective which the "injury in fact" test is designed to ensure. See *Blackstone Valley supra* at 933, citing *Baker v Carr* 369 U.S. 186, 204 (1962). (P.A. 19-25).

The petitioners* sue to prevent serious monetary, recreational and environmental damage to their homes and community which will surely happen if this community asset is misappropriated for private use and development.** The standing of similarly situated petitioners was not even questioned in *Citizens to Preserve Overton Park, Inc. v Solpe, supra.* The Court so noted in *Sierra Club v Morton, supra* at 734, a decision frequently cited in Rhode Island on standing issues. E.g. *Berberian v Solomon, supra* at 1180, *Blackstone Valley, supra* at 933 and 934.

The stated grounds for the R.I. Supreme Court's February 23 retroactive declaration that the petitioners have no right to bring this action was the bald, clerk signed assertion that "{O}nly the Attorney General has such standing." (P.A. 1-3) No statute, case law or other authority was cited. There is none. Four prior R.I. Supreme Court decisions — *Newport Hospital v Harvey,* 47 R.I. 382, 383, 133 A. 648 (1926); *Powers v Home for Aged Women,* 55 R.I. 187 at 192, 179 A. 610 (1935); *:Leo v Armington,* 74 R.I. 124, 59 A.2d 371 (1948); and *Israel v National Board of Y.M.C.A.,* 117 R.I. 614, 618, 369 A.2d 646, 649 (1977); and R.I.G.L., Sec.18-95- *supra* — all demonstrate that the Attorney General is *not* the sole person

*One is an abutting owner (P.A. 15, 23-24, and cited sources.)

**The economic value of open land to neighboring residents has been confirmed by recognized experts. The defendants, including some with real estate development experience have not challenged the plaintiffs' verified estimate that homes on or near Warwick Pond (to the west of Warwick Avenue) will lose at least 10 percent of their value should defendants ever proceed with their intended development. (P.A. 23-24) Lakeside's "non-economic" value, i.e. its environmental significance, its recreational and educational potential and its wortth to the entire Warwick community in its present undeveloped state, is demonstrated by R.I. Audubon Society executive director Hawkes' February 10, 1987 letter to the organizational petitioner (P.A. 26-29).

who may bring suit to enforce charitable trust duties and that making him a party, as the petitioners have done, is sufficient.* A copy of Section 18-9-5 is reproduced herein.** (P.A. 6). It provides for notice and participation opportunity, nothing more.

Having been made a party, the Attorney General has been given every opportunity to participate in this case and thus ensure that the public's rights are fully protected. This is all that *Newport Hospital* (1926), *Powers* (1935), *Leo* (1948), *Israel* (1977) and R.I.G.L., Sec. 18-9-5 (1956), *supra* require.

As the R.I. Supreme Court, re-declared in *Israel**** at 649:

> " 'It is well settled in this state and elsewhere that the attorney general is the representative of the interests of beneficiaries and the public under charitable trusts and bequests for charitable uses and that he should be made a party in any suit in which the existence of the validity of such a trust or such a bequest is really in question or the administration of such a trust is involved.' *Powers v Home for Aged Women*, 55 R.I. 187, 192, 179 A. 610, 612 (1935). Accord, *Leo v Armington*, 74 R.I., 124, 59 A.2d 371 (1948); *Newport Hosp. v. Harvey*, 47 R.I. 382, 133 A. 648 (1926)."

Similarly, as stated long ago in *Annotation*, 62 A.L.R. 881, 885-886 (1929) ("Who may maintain suit or proceedings to enforce or administer benevolent or charitable trusts") — listed as a collateral reference following Section 18-9-5 (P.A. 6):

> "Some cases, at least in the language of the opinion, appear

*The Attorney General himself seemed to agree in his aforementioned November, 1988 pre-argument memorandum, *supra* at page 8n. This position is also consistent with his 1987 failure to invoke certification following Judge Bulman's decision. See pages 5-6 *supra*.

**An earlier 1905 decision, *Stearns v The Newport Hospital*, 27 r.I. 309, 62 A. 132 — cited to both courts below — has no application. There, Attorney General Stearns had already commenced suit; clearly there was no reason for the Newport Mayor to join him as co-plaintiff.

***A 1977 case which involved R.I.G.L., Sec. 18-9-5, *supra* and its construction (at 651).

> to support the proposition that the attorney general is the only person entitled to maintain a suit to enforce or administer a charitable or benevolent trust. But this is not the general rule, as there are numerous cases set out elsewhere in the annotation in which the action has been held maintainable by other parties than the attorney general; and it seems to be sufficient if the latter is a party to a suit to enforce or administer the trust, either as plaintiff or defendant, for in either event the interests of the public at large, or of the indefinite class of the public who constitute the beneficiaries, are represented and protected."

The rights of community members similarly situated to maintain suit has also been recognized in recent decisions in other jurisdictions - *Parsons v Walker,* 28 *Ill. App.* 3rd 517, 328 N.E. 2d 920, 926 (1975) and *City of Reno v Goldwater,* 558 P.2d 532, 533 (Nev. 1976). The *Parsons* opinion, quoting Illinois' highest court, emphasized the importance of permitting tax paying community homeowners access to the courts to protect unique public use properties like Lakeside:

> " 'If the "public trust" doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.' (46 Ill. 2d at 341. 263 N.E.2d at 18)."

In *City of Reno, supra,* the Nevada Supreme Court stressed the aesthetic and recreational value of a public park and playground:

> "The donated property is and has been a lovely small park for many years and continues to be suited to that purpose. Consequently, we are not concerned with donated trust property which has never used for the purposes designated by the gift, or which has become inadequate for such purposes. The plainiffs, respondents here, are taxpayers and residents of the City of Reno who live in close proximity to Newlands Park and enjoy its beauty. Their standing to compel the City to honor its trust is beyond question."

A cause of action is a property right protected by the Fourteenth Amendment. *Logan v Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982); *Mullane v Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). A retroactive, clerk signed opinion depriving taxpaying

homeowners of their access to the courts to protect their homes and their environment from misappropriation of community open land — in favor of an attorney general, who has refused to lift a finger — is an outrage not to be tolerated in these crucial environmental times.

Simply put, the R.I. Supreme Court's February 23, 1989 standing ruling is (a) plainly untenable under the R.I. statute, case law and adopted Federal "injury in fact" test: (b) contrary to the adopted standing rule's most basic purpose and (c) manifestly unfair to these diligent plaintiffs*. It must not stand.

RULE 56 SUMMARY JUDGMENT WAS PATENTLY UNTENABLE

Judge Bourcier wrote no opinion. Although not recognized in the R.I. Supreme Court's subsequent February 23, 1989 decision, his *sole* ultimate summary judgment finding was that Lakeside was "not subject to the application of the *cy pres* doctrine of law which pertains to trust property..." (P.A. 4-5). The "trust property" phrase in the R.I. *cy pres* statute (R.I.G.L., Section 18-4-1, *supra*) refers not to an express trust, as the defendants argued below, but rather to "property held upon charitable trust." The R.I. Supreme Court so noted in 1926 in *City of Providence v Payne, supra* at 455.

Presiding Justice Walsh's 1951 *cy pres* decree thus represents a determination that Lakeside was held upon charitable trust by its initial charitable recipient, and, therefore, within Superior Court *cy pres* authority. Judge Bourcier, in 1988, erroneously thought that Judge Walsh had been mistaken in making that determination and, because it pertained to jurisdiction, that he was free to rule otherwise - 37 years later and on summary judgment.**

*And the neighboring community whom they represent. (P.A. 15-16, 23-25)

**See page 8 n, *supra* quoting July 1, 1988 transcript *supra* ("That is jurisdictional when you come down to it. Jurisdiction can be raised any time, nothwithstanding the erroneous assumption of jurisdiction in the previous situation. That concludes the matter. We'll stand in recess.")

Judge Bourcier was wrong for two reasons -- (1) *res judicata* and (2) summary judgment doctrine.* Judge Walsh possessed jurisdiction in the "fundamental sense" as defined in two recent R.I. Supreme Court decisions — *Hartt v Hartt, supra* and *State v Souza, supra* adopting and applying, *inter alia, Bradley v Fisher,* 80 U.S. 335 (1872) and *Stump v Sparkman,* 435 U.S. 349 (1978). All necessary parties (including the R.I. Attorney General) were before the Superior Court and asked it to exercise power in an area where the court was authorized to act. The respondents were therefore barred and estopped and the Superior Court lacked authority to overrule its 1951 determination. [This was not a situation where the court had declared counsel a "General in the Mexican Army" a crucial distinction not recognized by the court below, (argument transcript *supra* 29, 39).] See, also, *Auto - Lite Products, Inc. v Gilbane Building Company, supra* and *Petition of Downer Home,* 67 Wis. 2d 55, 226 N.W. 2d 444, 448-449, (1975).

Judge Bourcier was wrong in his 1988 overruling and reversal of Judge Walsh's 1951 charitable trust finding regarding Lakeside. The R.I. Supreme Court was wrong in failing to recognize that error in light of its recent decisions in *Hartt* and *Souza, supra.* Yet, even assuming that Judge Bourcier was not bound by Judge Walsh's 1951 charitable trust determination (which he clearly was), *both* courts below also erred by ignoring Rule 56 and summary judgment doctrine** — "issue finding, not issue determination." E.g. *Industrial National Bank v Peloso,* 397 A.2d 1312, 1313 (R.I. 1979).

This record - even with important discovery demands outstanding, including document requests and deposition notices addressed to the

*Both based on Rhode Island's adoption of such principles of Federal law. See page 9 n, *supra* and decisions cited therein.

**As noted earlier at pages 2, 6 and 9 n, *supra,* R.I. and F.R.C.P. Rules 56 are identical in all respects; in construing Rule 56 Rhode Island courts are "guided by Federal decisions..." *Nichola, supra* at 947.

moving parties themselves (another factor not recognized below) — contains substantial evidence that Lakeside was charitable trust property which the defendants, at the appellate level, again failed to mention much less discuss. Indeed, commencing with the Society's 1911-12 solicitation of community donated funds to acquire the Lakeside property in aid of pre-existing, yet handicapped recreational and remedial programs, and continuing over the next forty years, Lakeside and the Society's relationship with it constituted a continuous narrative of charitable trust. (P.A. 11-12, 20-23; see discussion at pages 23-24 *infra*).

When viewed against such documented, unchallenged historical facts and the R.I. courts' prior decisions favoring the recognition and the preservation of charitable trust gifts, Judge Walsh's 1951 acceptance and exercise of *cy pres* authority over Lakeside, as charitable trust property, was most appropriate.* Thus, regarding Judge Bourcier's finding (P.A. 4-5), the record presents, at most, a mixed question of law and fact. To decide that issue on summary judgment was clear error. *Nichola v John Hancock Mutual Life Insurance Co., supra* citing *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 157-61 (1970); *Anderson v Liberty Lobby, Inc*, 106 S. Ct. 2505 (1986) — (see Rehnquist, C.J., dissenting at 2522); *Kirkpatrick v Consolidated Underwriters*, 227 F.2d 228, 231 (4th Cir. 1955, Parker, C.J.) and decisions quoted and re-quoted therein.

Nevertheless, without mentioning the Superior Court's *sole*

*A charitable trust is not governed by technical requirements. The only requirements for *cy pres* jurisdiction are general charitable intent and public utility purpose. If broad inquiry including extrinsic evidence, reveals a "gift for the purpose and not the person" and if the purpose is that of "[unstained] public usefulness," its charitable character "insures its validity." *Pell v Mercer*, 14 R.I. 412, 435, 438 (1984); *R.I. Hospital Trust v Benedict*, 41 R.I. 143, 147-148, 150, 103 A. 815 (1918); *South Kingstown v Wakefield Trust Co.*, 48 R.I. 27, 30, 134 A. 815 (1926); *R.I. Hospital Trust v Williams*, 50 R.I. 385, 389, 390-391, 393, 148 A. 189 (1929); 15 *Am Jur 2nd Charities*, Sections 5-6 (1976).

finding (or any statutory or case law), the R.I. Supreme Court's February 23 decision/order would uphold summary judgment by declaring that Judge Bourcier made a *further* finding, i.e. that the 1951 *cy pres* conveyance to CF&S was in "fee simple, without any charitable restrictions whatever." (P.A. 2) Judge Bourcier strongly indicated an intention to find just that on June 13 oral argument (Transcript 32) but, significantly, made no such declaration in his July 1 decision, apparently determining, upon further reflection, that all issues turned on whether Lakeside was charitable trust property. See pages 8 n and 17 *supra*. However, even assuming a distinct finding that the 1951 conveyance to CF&S was in "fee simple, without any charitable restrictions", the record again shows nothing more than a mixed question of law and fact and thus improper for summary judgment determination.

Moreover, CF&S made repeated admissions of trust title in its initial August 1987 memorandum. (P.A. 30-31). Such admissions of trust title — also ignored by both courts below — sufficed in themselves to preclude summary judgment. *Cerqueira v Cerqueira*, 828 F.,2d 863, 865 (1st Cir. 1987); *United States v One Heckler - Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980); 10A C. Wright, A. Miller & H. Kane, *Federal Practice, and Procedure*, Section 2723 at 65-66 (1983). As stated in Wright, *supra*:

> "However, *admissions* in the brief of the party *opposing* the motion may be used in determining that there is no genuine issue as to any material fact, since they are functionally equivalent to "admissions on file," which are expressly mentioned in Rule 56(c) and are discussed in the preceding section. *Conversely*, an admission in a brief may show that there is an issue to be tried."*
>
> (Emphasis added)

*Because *Cerqueira v Cerqueira* adopted the reasoning of the authority cited above, the Rhode Island courts now stand in direct conflict with the First Circuit in their treatment of admissions, not to mention other principles of Rule 56 summary judgment. Rule 17.1(b)

[In a similar, almost *verbatim* restatement in its subsequent 1988 summary judgment memorandum, giving no explanation whatever, CF&S inserted the qualifying words "alleged" or "any alleged" trust. Compare P.A. 30-31 with P.A. 42-44. Similarly, CF&S made no mention of this matter in its appellate papers.]

CF&S has produced no letter, memorandum or other contemporaneous (1950-51) document which shows an intention to convey "fee simple (title), without any charitable restriction whatsoever." (Court's February 23, 1989 order/decision P.A. 1-3). Indeed, CF&S has doggedly *refused* to produce (and plaintiffs' outstanding discovery demands include) the very contemporaneous records which one would expect to shed light on CF&S' Lakeside title expectations, i.e. *complete*, unexpurgated - (rather than *50-75%* in some instances *90% deleted*) copies of CF&S' 1950-51 directors' minutes. (P.A. 32-44) Such resistance to discovery - again ignored by both courts below — also precludes summary judgment. *Quinn v Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445, (2nd Cir. 1980); *Sames v Gable*, 72 F.2d 49, 51 (3rd Cir. 1984); *Rolnick v El Al Airlines, Ltd.*, 551 F. Supp. 261, 264, (D.C. N.Y. 1982). As Chief Judge Kaufman observed in *Quinn supra* at 445:

> "Quinn's showing appears stronger still in light of defendants' successful efforts to resist discovery. Judge Munson's decision, after oral argument on the motions to treat defendants' motions as a request for summary judgment denied plaintiff a reasonable opportunity to elicit information within the control of his adversaries. At least when the party opposing the motion has not been dilatory in seeking discovery, summary judgment should not be granted when he is denied reasonable access to potentially favorable information. (Citations omitted)"

Equally appropriate, in light of CF&S' failure to produce its 1988 chief executive (and sole summary judgment affiant) for oral examination is Judge McLaughlin's statement in *Rolnick, supra* at 264:

> "Although it thus appears that the airline is not liable for the dangerous condition, the plaintiffs must be granted an opportunity to depose defendant's supervisor on the ownership and control issue. This conclusion follows from the principle that

summary judgment is inappropriate when, as here, a disputed fact is peculiarly within the knowledge of one of the parties. (Citations omitted)"

Significantly, no case has been found - before this one - and none has been cited by the respondents (or the courts below) — where once *cy pres* has been invoked, a successor charity's attempt to dispose of the property, unilaterally and without court authority, has been upheld. Indeed, as noted above, before changing its mind on summary judgment, CF&S made repeated admissions of trust title in its August 1987 memorandum (P.A. 30-31, 42-44). Plaintiffs have the right to a presumption, certainly on summary judgment where pleadings, affidavits, documents and conflicts must be viewed in a "light most favorable to the opposing party," that CF&S was right the first time.* Petitioners received no such consideration from the courts below.

RELIANCE ON AN UNPUBLISHED, NON-RECORD ATTORNEY GENERAL'S OPINION WAS PATENTLY UNTENABLE

During the February 13, 1989 oral argument - when its existence first surfaced - and again in its February 23 order/decision, the R.I. Supreme Court was visibly impressed and gave weight to an Attorney General "opinion" or finding of "no fault" with CF&S' June 1987 unilateral sale of the Lakeside property for private development. (P.A. 1-3). This was manifestly unjust. The record contains *no* Attorney General opinion or finding, written or oral.** Indeed, the Attorney General was given no advance notice of the proposed sale.*** (P.A. 18-19)

---

*E.g. *Nichola v John Hancock Mututal Life Insurance Co., supra* at 947-48; *Steinberg v State, supra* t 340; and *Adickes v S.H. Kress & Co., supra* at 158-159.

**As noted at page 3 n *supra*, the Attorney General had an opportunity to shed light on his omission in his March 13, 1989 memorandum, filed in response to the plaintiffs' application for reargument, but chose to make no mention of the matter (*Id*).

***CF&S' failure to give the Attorney General specific statutory Superior Court notice is in itself, grounds for *nullifying* the June, 1987 conveyance. *Donnelly v Israel, supra*

Disclosure of documentary evidence and the opportunity to confront and cross examine adverse witnesses are so basic to due process as to have "remained relatively immutable in our jurisprudence." *Goldberg v Kelly*, 397 U.S. 254, 259-270 (1970) quoting *Greene v McElroy*, 360 U.S. 474, 496-497 (1959). No state high court should have to be reminded of the gravity of any failure to observe these Constitutional requirements.

Moreover, having allowed itself to be diverted by a phantom document, the R.I. Supreme Court ignored declarations and opinions which *were* part of the record or contained in the case law briefed below. These included:

1. The initial charitable holder's* acknowledgment of its charitable trust duties by placing the Lakeside property's "management and control" in the hands of a special, newly constituted board of trustees ("Real Estate Managers") as confirmed by a 1920 Society committee report signed by Mssrs, Sharpe and Gardner. (*Id*, plaintiffs' supplemental answers to interrogatories, *supra*, No. 5 at pp. 7-8)

2. The 1936 opinion of a most distinguished Rhode Island lawyer, George H. Huddy, Jr. (after reviewing and have his recollection refreshed by a 24 page memorandum and appendix summarizing the Lakeside history) that:

> "...in view of the conditions under which (the Lakeside) property was purchased, the .... Society was obligated to continue to hold title as trustees for those purposes for which the property has been placed in its name."
>
> (P.A. 21-23)

3. The echoing Society* declaration eleven years later, in December, 1946, upon written recommendation of its president, former R.I. Attorney General Charles P. Sisson (in response to a proposal that Lakeside be deeded to a children's hospital center), that affirmative consideration would be given provided the

*Providence Society for Organizing Charity, now known as Family Service, Inc.

> "...proposed use shall have taken definite form and shall be reasonably consistent with the intent of those who provided the funds by which the property was acquired by our society"
> (*Id,* plaintiffs' supplemental answers to interrogatories *supra,* No. 13 at p. 20)

4. The answer of R.I. Attorney General Powers to the Society's February 1951 petition declaring that his office would consent to its *cy pres* application, provided appropriate *proof* was presented and which, as Judge Walsh's February 16, 1951 decree confirms, was in fact given. (*Id.*; P.A. 11-12; plaintiffs' supplemental answers *supra*, No. 9)

Indeed, the R.I. Attorney general's 1951 response and consent to Superior Court *cy pres* authority over Lakeside is just as binding as the Wisconsin Attorney General's was in *Petition of Downer Home, supra,* at 448-449:

> "We deal here and now with the *consequences, not the validity,* of the 1965 court order. However, it is clear that the court in 1965 applied the doctrine of *cy pres* to redefine the purpose of the trust and the authority of the trustee. So we are puzzled by the *state's now contending* that *cy pres* is *not* applicable to this trust fund after sale of the Downer Home * * * The State *could have sought termination* of the *trust* in 1965 when the Downer Home was sold. It is not likely that it would have succeeded, but, having *consented* to the sale of the real estate and modification of trust purposes in 1965, it certainly *cannot now claim* that *cy pres* was then inapplicable."
> (Emphasis added)

5. The continuing jurisdiction which the courts exercise over charitable gifts, especially after *cy pres* has been successfully invoked by the initial donee, as recognized by the R.I. Supreme Court and the R.I. Attorney General in *City of Providence v William E. Powers* 83 R.I. 512, 514, 120 A.2d 81 (1956):

> "The complainant city concedes that it never intended to bring a bill solely for a construction of the will and that the amended bill under consideration is not of that character. Apparently its theory is based on its own interpretation of this court's opinion in *City of Providence v Payne,* 47 R.I. 444 (1926). It claims that the issue as to the nature of the testator's intent was thereby determined; that this court decided therein that

> the testator had a *general* rather than a special charitable intent; and that, at least by implication, the Superior Court could proceed to apply *cy pres whenever efficient administration of the trust became impractical* because of *material changes* in circumstances. *Apparently this view is shared by the attorney general of the state, the original respondent."*
>
> (Emphasis added)

6. The Superior Court's exclusive *cy pres* responsibility regarding charitable properties like Lakeside, once the court's authority has been invoked, as aptly described in *Belcher v Conway*, 1979 Conn. 198, 425 A.2d 1254, 1257-1258 (1979):

> "It is clear that once the authority of the court is invoked, the ultimate responsibility for the application of the doctrine of *cy pres* or approximation to the charitable trust lies *with the court and not with the trustees* or the attorney general. (Citations omitted)"*

Needless to say, the petitioners would relish the opportunity - upon summary reversal and remand - to uncover** this missing R.I. Attorney General's "opinion" and subject its assumptions, reasoning and conclusions to real scrutiny. Fair play and due process requires nothing less.

THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THE COURT

This case turns on state adopted Federal law, i.e. injury-in-fact standing, *res judicata* and its application to fundamental/subject matter jurisdiction, and F.R.C.P. 56 and summary judgment doctrine. All of these matters were briefed and re-briefed below.*** See pages 5-11, 7-20 *supra*.

---

*Other decisions and authority conforming the Superior Court's exclusive, continuing jurisdictions include: *South Kingstown v Wakefield Trust Co., supra* at 32; *City of Providence v Powers, supra* at 514; *Faunce v Peoples Savings Bank*, 46 R.I. 75, 80, 124 A. 731 (1924); 15 *Am Jur 2d, Charities* Sec. 159 and, of course, the mandatory language of R.I.G.L., Sec. 18-4-1 ("shall") *supra*.

**R.I. and Federal Rules 34 are also identical.

***The sole exception was the Attorney General's "opinion" which, as noted at pages 3 and 23 *supra*, did not surface until the February 13, 1989 appellate oral argument. This matter was briefed in the petitioners' February 28 application for reargument. Contrary positions taken by prior Attorneys General were mentioned in earlier briefs in both courts below.

There is no state law to support the result below. Under these circumstances United States Supreme Court review is not only appropriate but highly desirable. 16 C. Wright, *supra*, Sec. 4021 at 676; Sec. 4027 at 737-738, Sec. 4031 at 764-765, 768-769. As Wright declares in Sec. 4031 above:

> "The interests in expert and uniform interpretation of federal law are nearly as great as if federal law had directly created the claim or defense. In addition, there is little difference in the need to protect the litigants against mistaken conclusions of federal law. Even if these interests would not be sufficient to create original federal question jurisdiction, they justify Supreme Court review after a completed state court decision has made it clear that federal questions control the outcome." (*Id.* 764-765)

The benefits of Supreme Court review and enforcement are especially apparent when, as here, the interpretation of adopted Federal Rules of Civil Procedure is involved. As Wright notes at page 768:

> "Adoption of federal rules of procedure adds a further interest in achieving uniformity — state courts might believe it very important that state lawyers be able to rely on a single system of procedure in all courts in the state."*

and in conclusion at 769:

> "On balance, it would seem most appropriate to recognize jurisdiction only if state law has incorporated federal law in circumstances that promote the uniform planning of private conduct. State and federal interests in review are strongest in such circumstances, and the dearth of present authority suggests that no substantial burden would be imposed on the court."

Supreme Court review of state court decisions that technically rest on state law, but in fact are determined by voluntary incorporation of federal law by reference, has also been urged by other

---

*States courts do! See, for example, *Brown v Credit Center, Inc.*, 444 So. 2d 358, 364 (Miss. 1983), where the Mississippi Supreme Court noted the importance of integrated construction of F.R.C.P. 56 and Mississippi's adopted Rule 56, pointing out that "disparity in interpretation would inevitably lead to forum shopping, which has been a perceived evil for at least half a century."

commentators. See 16 C. Wright *supra* (1988 Supplement) pages 680-681 noting and quoting Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 1985, 19 Ga. L. Rev. 861:

> " '{T}he primary reason for urging Supreme Court review of state decisions that interpret federal law incorporated by reference is to further the interests of interactive cooperative federalism by encouraging a direct dialogue between the highest courts of the two sovereigns.' State courts would benefit from direct exchange with the Supreme Court. The Supreme Court in turn might benefit from direct review of state decisions, and in any event would have available for discretionary review a wider array of fact situations out of which to develop federal law."

Going beyond these federal questions, the Court should also reverse and remand because of the plain error below in breach of federal constitutional standards. *Wood v Georgia*, 450 U.S. 261 (1981); *Vachon v New Hampshire*, 414 U.S. 478 (1974); *Eddings v Oklahoma*, 455 U.S. 104, 117 (1982) (O'Connor concurring). Respondents should not complain that such federal constitutional error was not technically argued until very late below. (See pages 10 and 13 *supra*; P.A. 45-46).

Regarding standing, petitioners could hardly have anticipated that the R.I. Supreme Court would plow under four prior decisions and one statute, most recently interpreted in 1977 (*Israel, supra*) and suddenly announce a retroactive rule that only the Attorney General could sue. *PruneYard Shopping Center v Robbins*, 447 U.S. 74, 85 n 9 (1980) citing *Brinkerhoff-Faris Co. v Hill*, 281 U.S. 673 (1930). That such was "manifestly unfair" to the petitioners was firmly stated in their February 28 application fo reargument, words which should have sufficed to remind the court below that due process standards had been breached. See, *Taylor v Kentucky*, 436 U.S. 478, 482 n. 10 (1978) and *Bolling v Sharpe supra*, page 13 n.

As to the Attorney General's "opinion", whose alleged existence did not surface until the February 13 appellate oral argument, the

petitioners' February 28 reargument application made it clear that the court had given weight to a document which the petitioners had never been given no opportunity to examine or answer. No state high court, especially in these times, needs reminding of this breach of fair play or that nothing is more basic to due process than the right to confront and question the opposition's proof. *Goldberg v Kelly, supra.*

The same observations also apply to the lower courts' handling of Rule 56 summary judgment. As noted long ago (1955) in *Kirkpatrick supra*, at 231 and other federal decisions cited and quoted therein, the Constitution guarantees the trial of disputed questions of fact and mixed questions of fact and law; Rule 56 authorizes summary judgment only where it is "quite clear what the truth it..." [quoting Mr. Justice Jackson speaking for the Court in *Sartor v Arkansas Natural Gas Co.*, 321 U.S. 620, 627 (1944).]

The Supreme Court, in any event, has the authority (28 U.S.C. Sec. 2106) to "require further proceedings as may be just under the circumstances." *Wood* and *Eddings, supra* The "circumstances" of this case precisely call for just that.

CONCLUSION

A writ of certiorari should be granted. The judgment of the Rhode Island Supreme Court should be summarily reversed. The case should be remanded to the trial court for completion of the petitioners' pre-trial discovery.

Providence, Rhode Island
June 9, 1989

Respectfully submitted,
ROBERT S. STITT
(Counsel of Record)
PEARLMAN, VOGEL & VIOLET
Blackstone Boulevard Terrace
P.O. Drawer 9007
Providence, RI 02940
(401) 726-6200
Attorneys for Petitioners

PETITIONERS' APPENDIX

SUPREME COURT
No.88-426-Appeal

FRIENDS OF WARWICK POND ET AL:

V. :

CHILDREN'S FRIEND AND :
SERVICE ET AL :

ORDER

This matter was before the Supreme Court on an order issued to all parties to appear and show cause why the issues involved in this appeal should not be summarily decided.

This action arose out of the allegation by the plaintiffs that the defendants,Children's Friend and Service, Inc., as a successor charity holder, should not be permitted to sell certain land for private development and profit. They assert that the parcel of land was originally acquired for charitable purposes and under the doctrine of cy pres the proposed sale should not be permitted.

The Superior Court granted defendants' motion for summary judgment and ruled that the cy pres doctrine had no application. The court found that the original conveyances to defendant were made in fee simple, without any charitable restrictions whatever.

After examining the memoranda by the parties and after hearing their counsel in oral argument, it is the conclusion of the court that cause has not been shown. We are of the opinion that the gift of the subject real estate was unrestricted and therefore it may be sold and the proceeds may be used for general corporate charitable purposes.

Moreover, the plaintiffs have no standing to bring the complaint in this action. Only the Attorney General has such standing. The Attorney General has indicated that he finds no fault with the sale of this realty by Children's Friend and Service.

Therefore, the appeal of the plaintiffs' is denied and dismissed, the judgment of the Superior

Court is affirmed and the papers of the case are remanded to the Superior Court. Entered as an Order of this Court this 23 day of February 1989.

By Order,

s/

Matthew J. Smith
Clerk

Justice Kelleher did not participate.

* * * *

ORDER DENYING REARGUMENT

Friends of Warwick Pond, et al

vs

Supreme Ct.
No. 88-426-A

Children's Friend and
Service, Inc. et al

O R D E R

The petition to reargue is denied.

Justice Kelleher did not participate.

Entered as an Order of this Court this 13th day of March 1989.

By Order,

s/

Matthew J. Smith
Clerk

STATE OF RHODE ISLAND SUPERIOR COURT
KENT, SC.

WARWICK LAND TRUST, INC., et al

vs KC 87-811

CHILDREN'S FRIEND AND SERVICE, INC., et al

JUDGMENT

This matter came on for hearing before the Court, Mr. Justice Bourcier presiding, on June 13, 1988, upon Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure. After hearing thereon, it is hereby

ORDERED AND ADJUDGED

1. The defendants' Motion for Summary Judgment is granted. The Court finds that the real estate in question is not subject to the application of the cy pres doctrine of law which pertains to trust property, and that as a consequence thereof, there remains no material issue of fact to be resolved and defendants are entitled to Judgment as a matter of law.

2. In accordance with Rule 54(b) R.C.P.,

Judgment for the defendants, Children's Friend and Service, Inc., and R & F Associates on their Motions for Summary Judgment will enter upon the entry of this Judgment, the Court havng determined that there is no just reason for delay.

Dated at West Warwick, Rhode Island, this 1st day of July, 1988.

Per Order,

s/ Anthony Piccirilli

_____

Deputy Clerk

ENTER:

s/ Bourcier

_____

Justice

DATED: 7/1/88

18-9-5. Notice to attorney-general of proceedings affecting charitable trust - The attorney general shall be notified of all judicial proceedings affecting, or in any manner dealing with, a charitable trust or affecting, or in any manner dealing with, a trustee who holds in trust within the state property given, devised or bequeathed for charitable, educational or religious purposes, and who administers or is under a duty to administer the same in whole or in part for said purposes within the state, and shall be deemed to be an interested party thereto.

Rule 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part therof.

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof.

(c) Motion and Procedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forwith if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

d-Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversary, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established , and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not so respond, summary judgment, if .

appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

FAMILY SERVICE, INC.	;	
	;	
-v-	;	Eq. No. 21550
	;	
WILLIAM E. POWERS, Attorney General of the State of Rhode Island	;	

FINAL DECREE

This cause came on to be heard on the bill, answer and proof, and it appearing that conveyance to Children's Friend and Service of the real estate described in the bill of complaint will permit the continued carrying out of the charitable purposes for which said real estate has heretofore been held and used by Family Service, Inc., and is also consistent with the intentions of the persons who caused the conveyance of said real estate to Family Service, Inc., the complainant is hereby authorized to execute and

deliver a deed or deeds conveying said real estate to Children's Friend and Service, to be held for its general uses and purposes.

Entered as the decree of Court this 16th day of February, A.D. 1951.

Enter:

s/ Walsh, P.J.
2/16/51

By order,

_____
Ass't. Clerk

P.A. 1.

KNOW ALL MEN BY THESE PRESENTS,

that FAMILY SERVICE, INC., a charitable corporation of the State of Rhode Island, located in the City of Providence, in said State (formerly known as Providence Society for Organizing Charity), in consideration of the sum of One Dollar ($1) to it paid by CHILDREN'S FRIEND AND SERVICE, also a charitable corporation of said State of Rhode Island, located in said Providence, the receipt whereof is hereby acknowledged, pursuant to authority in it vested by decree of the Superior Court of the County of Providence and State of Rhode Island entered February 16, 1951, in that case entitled "Family Service, Inc. v. William E. Powers, Attorney General of the State of Rhode Island, Eq. No. 21550," does hereby give, grant, bargain, sell and convey unto the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, -

1. That certain estate situated on Rocky Point Road, in the Town of Warwick, County of Kent and State of Rhode Island, known as "Lake View

Hotel Property," comprising the land and all buildings and improvements thereon, the said land being described as follows:

[Metes and Bounds Discriptions Omitted]

TO HAVE AND TO HOLD the same, with all rights, privileges and appurtenances thereunto appertaining, unto and to the use of the said CHILDREN'S FRIEND AND SERVICE, its successors and assigns forever, to be held by said Children's Friend and Service for its general uses and purposes.

IN WITNESS WHEREOF, said Family Service, Inc. has hereunto caused its name to be signed and its corporate seal to be affixed by its officer thereunto duly authorized, and by its board of Real Estate Managers, this 24th day of March, A.D. 1951.

FAMILY SERVICE, INC.

By Lauriston E. Knowlton
President

This consideration is not such as to require that Federal documentary stamps be affixed.

Board of Real Estate Managers
(s/ Henry Sharpe
(s/ Preston H. Gardiner
(s/ Clarence H. Philback
(s/ Robert H. Ives Goddard
(s/ George H. Huddy, Jr.

[Acknowledgments Omitted]

AFFIDAVIT OPPOSING DEFENDANT'S SUMMARY JUDGMENT MOTION

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

PAUL HULING, being duly sworn, deposes that he is a plaintiff herein and, at all material times, president of the corporate co-plaintiff - Friends of Warwick Pond and Hoxsie , also Warwick Land Trust ("Warwick Land Trust"). Deponent and his family reside at 107 Fairway Lane approximately 300 feet from the property at issue ("Lakeside"). All of the facts herein after stated are, unless otherwise indicated, within deponent's personal knowledge. Plaintiffs' supplemental answers to CF S interrogatories filed January 25, 1988 (60 page including the appendix) and plaintiffs' amended verified complaint, filed March 31, 1988 (30 page including exhibits) - both verified by deponent - are incorporated by reference.

Early Opposition

Since November, 1986 when the Warwick community first became aware of defendant Children's Friend & Service's ("CF&S") efforts to

exploit and to develop the Lakeside property and thus change its use from community enjoyment to private profit, deponent and other Warwick residents organized in opposition. (The Warwick Land Trust, including our prior label, "Friends of Warwick Pond and Hoxsie," was incorporated in April, 1987.) CF&S' initial proposal to sell and use the Lakeside property for apartments was rejected following a November, 1986 public hearing. Nine hundred residents signed our petitions and two hundred attended in opposition.

Spring 1987

During March/April 1987 the Warwick Land Trust and the general community learned of CF&S' subsequent intentions to sell the Lakeside property to defendant Frank Sherry to construct 64 houses thereon. Our efforts to communicate with CF&S and its directors - even to learn their identities - were frustrated. Finally, during late May/early June we learned that CF&S' "price" was $900,000.00. The Warwick Land Trust met with a representative of Governor DiPrete. We were told

that the required funds were and would be made available. This information was passed on to CF&S as confirmed by a series of telephone conservations between or among CF&S' executive director, its real estate counsel, Warwick Land Trust's corporate counsel and me, as Warwick Land Trust president. In summary, the Land Trust was told that it was "too late" and that the property would be transferred on June 12, unidentified title problems having been "cured".

(The availability of sufficient funds was again confirmed in September 1987, when (a) the R.I. Department of Environmental Management approved $720,000.00 in matching grants to the Warwick Land Trust and the City of Warwick and (b) the R.I. Heritage Preservation Commission authorized a $250,000.00 loan commitment to acquire the Lakeside property.)

The aforementioned "title problems", also suggested by other sources, caused the Land Trust - on or about, June 5, - to examine the April, 1951 recorded deed from Family Service to CF&S and

the Court's February 16, 1951 cy pres decree authorizing the transfer. See copy annexed to our amended verified complaint. The Land Trust was then told that an R & F representative had also expressed interest in the Court's file. As indicated in our accompanying memorandum, depositions of the aforesaid CF&S and R&F representatives are outstanding.

RI Attorney General Communications

During June/July 1987, after the purported June 12, 1987 closing(s), the Warwick Land Trust, directly and indirectly contacted the Attorney General to ascertain whether his office would help. Communications were cordial, yet uncertain. Clearly, the Attorney General and his office had not been notified of any intention to transfer the Lakeside property prior to the aforementioned June 12, 1987 "closing (s)". However, when it appeared even as late as August 1 that the Department would not commence suit, the Warwick Land Trust and the individual co-plaintiffs (officers and directors active in Land Trust affairs) instructed counsel

to proceed. As indicated, the Attorney General was named a party for the sole purpose of ensuring jurisdiction (Initial complaint par. 7; amended verified complaint, par.11) He and his office were so advised on August 3. Subsequently, at the CF&S oral examination of co-plaintiff Eileen S. Naughton on November 10, 1987- which deponent attended - Assistant Attorney General Murray pointedly noted that his office had not been notified of the June 12, 1987 transactions. The transcript so shows. (Id.151)

August 24, 1987 Hearing

Deponent also attended the Court's August 24 hearing on CF&S' prior motion to dismiss this action. Deponent calls upon CF&S to file the complete, not simply a partial copy of the transcript. After hearing both sides, Judge Bulman upheld the sufficiency of our initial complaint, our accompanying right to proceed and, as CF&S' partial transcript confirms, the plaintiffs' right to "get their licks in". To me this meant full pre-trial discovery. (Indeed, our litigation

counsel, Mr. Stitt, reported to me following a later hearing that fall that the Court made reference to the aforementioned August 24 ruling in upholding the plaintiffs' notice to depose CF&S by its president (the affiant Aitken) and its aforementioned executive director, Mr. DiChirico).

November 10, 1987 Naughton Deposition

As stated above, deponent attended CF&S' oral examination of Mrs. Naughton last November 10. Again CF&S seeks to misconstrue proceedings by resorting to just an excerpt. Deponent calls upon CF&S to file the complete Naughton transcript. It will confirm that while the individual plaintiffs do not claim personal title to the Lakeside property, the Court in exercise of its equitable and charitable jurisdiction could well divest CF&S of title and transfer the property to some other entity which would be prepared to hold and use the property consistent with the Court's 1951 decree and the original donors' charitable intentions. (Cf. plaintiffs' supplemental answers to CF&S interrogatories (par 25), which Mrs. Naughton and

her co-plaintiffs verified January 24, 1988.4

The highlight of Mrs. Naughton's testimony, which CF&S does not mention, was her recital of the historical research of the initial donee's corporate records which she, co-plaintiff Jeanne M. Foster and Maureen Callahan had just conducted at Family Service, Inc.. Copies of a number of th records found, identified by Mrs. Naughton and actually self-authenticating, were produced and explained at that time. Those documents and other were appended to the aforementioned January 1988 supplemental answers to interrogatories. Such documents, which the defendants have not dared mention on this motion, form the primary basis fo paragraphs 17-41 of the plaintiffs' March 31, amended verified complaint.

The plaintiffs' research is still going on. For example, Dr. Faunce, who temporarily accepted title to the first donated parcel in 1912, as "trustee" was the charitable donee's president (not just Brown University's). Cf. amended verifie complaint, par. 18. The funds donated to acquire

an adjoining parcel in 1916 appear, in large measure, to have come from Henry D. Sharpe who succeeded Dr.Faunce as president of the Providence Society for Organizing Charity (subsequently, Family Welfare Society and later Family Service, Inc.) in 1913. Cf. amended verified complaint, par.21. The document January 18, 1936 statement by the Society's then Honorary Counsel, George H. Huddy, Jr., Esq., that "in view of the conditions under which (the Lakeside) property was purchased the ...Society was obligated to continue to hold title as trustee for those purposes for which the property was placed in its name ...", is more than an isolated opinion and recollection. Cf. amended verified complaint , pars. 20,27 (b)(d) and (f). It now appears that in 1936, when the Tuberculosis League's lease "came up for renewal" (Cf. verified complaint pars. 16, 22-25, 27 (c)(d) and (e), (f) and (g) and 28-34) the League asked for the title to Lakeside, but, "after much thought and discussion", the Society heeding Mr. Huddy's counsel decided not to transfer title to the

League but to renew its lease for ten more years. (Steadily...Through the Years - the Family Welfar Society of Providence, 1942).

In addition to the community support for Lakeside programs, mentioned in their amended verified complaint, (pars. 35-37) the plaintiffs have now learned that the State of Rhode Island was a substantial contributor - $100,000.00 in 1975 and $51,000.00 in 1977. (Providence Journal articles June 2 and June 15, 1977).

Class Action Purpose

As indicated above and in the accompanying memorandum of law, the plaintiffs' authority to pursue this suit was confirmed by the Court's August 24 rulings. Deponent submits that that decision should not be disturbed. The class or classes we represent include (a) some 2,000 persons, including deponent and co-plaintiffs Foster and Kathleen Preiss, who reside west of Warwick Avenue near Warwick Pond and Lakeside; (b some 87,000 additional Warwick residents - including the co-plaintiff Naughton and (c) some

900,000 other Rhode Islanders, the entire state having an interest in preserving open land. (Amended verified complaint, pars. 1-5, 26, 35-37, 43, 61-64, 73-78; plaintiffs supplemental answers to the interrogatories, pars. 1-4, 5 (pp.9-11), 12, 14, 15, 18, 22, 25, and 28). The recreational environmental and home value damage which we seek to prevent is real and documented. See, especially, our supplemental answers to interrogatory No. 18 and (a) the annexed February 20, 1987 Audubon Society letter signed by its distinguished executive director Alfred L. Hawkes and (b) the annexed October 29, 1987 East Greenwich Pendulum article quoting Mr. Hawkes and that community's respected town planner, Richard Youngken.

More importantly, the plaintiffs have justified the Court's August 24 ruling by raising money , performing investigation and otherwise conducting this suit diligently. (Several hundred persons, including a Toronto, Canada resident, have responded to our litigation fund raising

appeals and more are being planned.) More investigation, including pending discovery motions, is required. Such discovery applications (also incorporated herein) are also pending on the May 23 calendar and need no further support or comment by this deponent .

Conclusion

For reasons stated above and in counsel's accompanying memorandum, CF&S' dismissal motion should be denied.

s/Paul Huling

Paul Huling

Subscribed and sworn to before me this 19th day of May 1988 in the City of Pawtucket, County of Providence and State of Rhode Island.

s/ Susan Ferranti

Susan Ferranti
My commission expires
June 30, 1991

AUDUBON SOCIETY
Of RHODE ISLAND

12 Sanderson Road
Smithfield, RI 02917

Alfred L. Hawkes
Executive Director

February 20, 1987

Friends of Warwick Pond and Hoxsie
c/o Jean Foster
31 Lakecrest Drive
Warwick, RI

Dear Friends:

This letter is to convey the strong support of the Audubon Society of Rhode Island for your efforts to preserve the Children's Friend and Service land on Warwick Pond by purchasing it from that organization.

I have visited the property personally and concur fully it is not only exceedingly valuable open space but is also high value wildlife land in addition. It is diverse in vegetation cover, exceedingly wet in places, contains a mature stand of pine and a second and younger pine stand of almost equal size. A principal value as open space and for wildlife is the shoreline protected by the property on Warwick Pond. There is some field habitat as well as a mature oak/hickory stand and red-maple swamp in the wet areas.

Low-intensity recreational and educational use of this property would not significantly impinge on its wildlife values, but the emphasis must be on "low-intensity".

The value of this land is, at present, further enhanced by the nearly abutting undeveloped state

and private wetlands immediately across Lake Shore Drive from the subject land. The wildlife corridor created by this combination is of great significance in such an intensely developed area.

As a former resident of the Hoxsie area, I can personally attest to the desperate need for protecting this last remnant of open land in this now urban neighborhood. Its relatively large size, proximity to the pond and other protected open space, unquestionable wildlife value, undisturbed nature, and recreational and educational potential make its value to the entire community of Warwick greatest in its present undeveloped state. There is no possibility that the tax return to the City from development of this land could in any way be adequate recompense for the loss of open space and other values to the City of Warwick as a whole.

Again, we strongly endorse your efforts, offer our support wherever possible, and congradulate you on

the lively and well-organized effort you are sustaining.

Very truly yours,

s/ Alfred L. Hawkes

Executive Director

ALH:mm

Serving Rhode Island Since 1897

Excerpt CF&S August 17, 1987 Memorandum

In the instant case, the Attorney General has not seen fit to institute an action for the enforcement of this CF&S trust.* Moreover, the administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction.

Plaintiffs are not co-trustees of the CF&S trust,* nor are they specifically beneficiaries under the trust.* Plaintiffs have no special interest in the land, no more so than any neighborhood resident, any resident of the City of Warwick, nor for that matter, any more so than each and every Rhode Islander. If Plaintiffs had indeed benefited from CF&S`s permitting them to use the CF&S property for Plaintiffs' recreational activities, this benefit, however, would have accrued only as a consequence of Plaintiffs being mere members of the general public. They are not the specific beneficiaries of the CF&S trust,* and therefore they hold no legally protected interest in maintaining the CF&S trust.* Thus, under the

*EMPHASIS ADDED

clear application of well-settled law in this situation, Plaintiffs suit should be dismissed, with prejudice, for want of standing.

C. Statutory Provisions

R.I.G.L. Section 18-4-13 governs the statutory standing for parties to proceedings involving the administration of trusts. This section provides standing to "[a]ny persons who have any vested, contingent, executory or future right, title, interest or estate in or to any part of said trust property, and any persons who might be any future contingency have any such right, title, interest, or estate." It is readily gleaned from the instant Complaint that Plaintiffs have neither alleged nor demonstrated sufficient right, title, interest or estate to pass the threshold test for standing found in R.I.G.L. Section 18-4-13. Plaintiffs have no legal or equitable interest in the CF&S trust property* which would entitle them to maintain or join an action, pursuant to R.I.G.L. Section 18-4-10, concerning the management of the CF&S trust property.*

*EMPHASIS ADDED

RE-SCHEDULED MOTION TO COMPEL PRODUCTION FROM CHILDREN'S FRIEND AND SERVICE

Having served their amended verified complaint upon all additional parties and said additional parties having filed answers thereto, as provided in the Court's March 28, 1988 order (decretal paragraph 3), plaintiffs renew their annexed March 8, 1988 motion for an order compelling defendant Sherry (sic) to produce documents therein specified and granting other just relief.

Plaintiffs,
By their Attorneys,

PEARLMAN, VOGEL & VIOLET

Robert S. Stitt, Esq.
P.O. Drawer 907
Providence, Ri 02940
(401) 726-6200

Dated: April 29, 1988

PLAINTIFFS' MOTION TO COMPEL PRODUCTION

FROM DEFENDANT,

CHILDREN' S FRIEND & SERVICE, INC.

("CF&S")

Plaintiffs' move for an order compelling defendant CF&S to produce complete or alternatively less expurgated copies of 1950-1952 CF&S board meetings as required by December 14, 1987 Court ruling and subsequent order. Plaintiffs' motion should be granted for the following reasons:

1. Such contemporaneous (1950-1952) CF&S board meeting minutes are within the scope of items 6, 7, and 8 of the plaintiffs' amended document request, dated November 14, 1987 and the Court's December 14, 1987 ruling and subsequent order. See copies annexed hereto.

2. The foregoing ruling and order contained no provision (a) limiting defendant CF&S' compliance or (b) providing for delivery of expurgated copies. Id.

3. By letter dated January 25, 1988, in purported compliance with the aforesaid discovery, CF&S delivered expurgated copies of eleven CF&S 1950-1952 board meeting minutes and one expurgated copy of an October 19, 1950 letter from the Chairman of the CF&S Lakeside Committee to the Chairman of Providence Council of Community Services. See tendered photocopies annexed hereto.

4. Without impugning in any way the integrity of the deletor, plaintiffs' have informed CF &S that such expurgated documents cannot be accepted because:

(a) differing opinions as what is confidential and priviledged from disclosure or even relevancy; e.g. see annexed comparison of CF&S expurgated copy, of Chairman Smith's October 19, 1950 letter with the complete copy voluntarily produced by Family Service and appended to Plaintiffs' January 25 supplemental answer to CF&S interrogatories, showing the clear linkage between (a) the real property which CF&S obtained through Family Service's 1951 Superior Court cy pres proceeding and endowment funds which CF&S obtained from the Providence Tuberculosis League 1951 Superior Court cy pres proceeding.

(b) confidentiality of (1) adoption matters and (2) personnel matters can be served by simply blocking out names, addresses, positions and

salaries;

(c) thirty-five year old documents - 50, 75 in some instances 90% deleted - are of very limited use in litigation and would create unnecessary problems at trial;

(d) the rights of all persons could be protected by in camera examination and ruling.

Plaintiffs'

By their Attorney:

s/Robert S. Stitt

Robert S. Stitt

P. O.Drawer 9007

Providence, RI 02940

HEARING NOTICE

The within motion is noticed for hearing on March 14, 1988.

The regular board meeting of the Children's Friend and Service was held on January 24th, 1951 in the Board of Directors' Room of the Rhode Island Hospital Trust Company. The meeting was called to order by the President, Mr. Gurney Edwards, and those present included Mrs. Nella Lane Gardner, Executive Director, Miss Natalie Dunbar, Director of Casework, and the following board members: -

Mrs. DeForest W. Abel
Mrs. John W. Baker
Mrs. J. Murray Beardsley
Mrs. Edward S. Brackett,
Mrs. James P. Brown
Mr. Herbert B. Carkin
Mrs. Morgan Cutts
Mrs. Allen H. Chatterton
Mr. Gurney Edward
Mr. Carl W. Haffenreffer
Mrs. Ralph S. Hamilton
Judge Edward L. Leahy
Mrs. Stanley Livingston, Jr.
Mr. Charles B. McGowan
Mr. Malcolm E. Read
Mrs. Roger W. Shattuck
Mrs. Erockholist Smith
Mrs. Chandler E. Swallow
Mrs. Henry E. Utter

*Remainder of Page 1 blacked out.

Mr. Edwards reported that Family Service had taken action on Lakeside. The legal steps are in process and it is expected that the transfer of property will be completed about February 15, 1951. Mrs. Gardner said that the staff was ready to move and a caseworker assigned to Lakeside. $20,000 has been set aside by the Community Fund for the continued operation of Lakeside this year. The housing committee will meet again promptly.

*Remainder of Page 2 blacked out.

*Beginning of Page 3 blacked out.

There being no further business the meeting adjourned at twelve noon.

Respectfully submitted,

Katharine K. Cutts
Secretary

The regular meeting of the Board of Directors of the Children's Friend and Service was held on February 28, 1951 at 11 A.M. In the Directors' Room of the Rhode Island Hospital Trust Company. The meeting was brought to order by Mr. McGowan, Vice-President, and those present included, Mrs. Nelle Lane Gardner, Executive Director, Miss Natalie Dunbar, Director of Casework, and the following members:

Mr. DeForest W. Abel
Mrs. John W. Baker
Mrs. J. Murray Beardsley
Mrs. James P. Brown
Mr. Pasquale J. Capuano
Mrs. Allen H. Chatterton
Mrs. Wiliam Davis Cole
Mrs. Morgan Cutts
Mrs. Russell J. Dayton
Mr. Pardon R. Kenney
Mrs. William T. Lees
Mrs. Stanley Livingston, Jr.
Mrs. W. Kinsley Low
Mr. E. John Lownes, Jr.
Mr. Charles S. McGowan
Mrs. F. Edward Pollard
Mrs. Roger W. Shattuck
Mr. Clayton D. Sheldon
Mrs. Henry Van Hoesen
Mr. James N. Williams

*Center half Page 1 blacked out.

Mrs. Gardner reported that the Lakeside property had been transfered to this organization in court on February 16, 1951. The final deed has not yet been furnished by Superior Court. In the interim, meetings have been arranged with the T.B. League for consultation. We have a caseworker ready and we expect to take over the operation of Lakeside on April 1st. The report of progress has been given to the Lion's Club who are interested in helping. It is planned for the present to use the buildings as they are.

*Entire Page 2 & Upper third of Page 3 is blacked out.

There being no further business the meeting was adjourned.

Respectfully submitted,

s/ Katherine K. Cutts

(Mrs.) Katherine K. Cutts
Secretary

Excerpt CF&S April 26, 1988 Memorandum

In the instant case, the Attorney General has not seen fit to institute an action for the enforcement of the CF&S trust. Moreover, the administrative arm of the Attorney General Department responsible for the enforcement of charitable trusts has not found cause to even investigate this land transaction.

Plaintiffs are not co-trustees of any alleged CF&S trust,* nor are they specifically beneficiaries under any alleged trust.* Plaintiffs have no special interest in the land, no more so than any neighborhood resident, any resident of the City of Warwick, nor for that matter, any more so than each and every Rhode Islander. If plaintiffs had indeed benefited from CF&S' permitting them to use the CF&S property for plaintiffs' recreational activities, this benefit, however, would have accrued only as a consequence of plaintiffs being mere members of the general public and gave them no rights. They are not the

*EMPHASIS ADDED

specific beneficiaries of any alleged CF&S trust,* and therefore they hold no legally protected interest in maintaining the alleged CF&S trust.* Thus, under the clear application of well-settled law in this situation, plaintiffs suit should be dismissed, with prejudice, for want of standing.

C. Statutory Provisions

Section 18-4-13 R.I.G.L. (1981 reenactment) governs the statutory standing for parties to proceedings involving the administration of trusts. This section provides standing to "[a]ny persons who have any vested, contingent, executory or future right, title, interest or estate in or to any part of said trust property, and any persons who might by any future contingency have any such right, titlle, interest, or estate." It is readily gleaned from the instant Complaint that plaintiffs have neither alleged nor demonstrated sufficient right, title, interest or estate to pass the threshold test for standing found in section 18-4-13 R.I.G.L. (1981 reenactment).

*EMPHASIS ADDED

plaintiffs have no legal or equitable interst in any alleged CF&S trust* property which would entitle them to maintain or join an action, pursuant to section 18-4-1Ø R.I.G.L. (1981 reenactment).

*EMPHASIS ADDED

March 16, 1989

Supreme Court, State of Rhode Island
Providence, County Courthouse
250 Benefit Street
Providence, RI 02903

RE: Friends of Warwick Pond, et al
VS: Children's Friend and Services, Inc. et al
SUPREME COURT NO.: 88-426-A
C.A. No: KC-811
Warwick Lis Pendens Filed August 20, 1987

Dear Sirs:

We acknowledge receipt this morning of the Court's March 13, 1989 order denying the plaintiffs' February 28 petition for reargument. We advise the Court and, by copy of this letter, all others interested or concerned, that the plaintiffs will now petition the United States Supreme Court for a writ of certiorari on grounds inter alia, that the

plaintiffs have been denied equal protection of the law and due process.

Respectfully,

PEARLMAN, VOGEL & VIOLET

s/Robert S. Stitt

_____

Robert S. Stitt

RSS/wt